No. 11,088

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, Executor of the Estate of Margaret Eyre Girvin, Deceased,
Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT'S PETITION FOR A REHEARING.

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To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

We appear in this case as *amici curiae* and respectfully urge this Court to grant respondent's petition for a rehearing herein on the grounds hereinafter stated.

REASONS FOR APPEARANCE.

Our interest in the instant case arises from the fact that we are attorneys for the plaintiff executor in two cases pending in the United States District Court for the Northern District of California, Southern Division, in each of which the facts are substantially the same as those involved in the instant case, and in each of which the decision will in all probability be controlled by the decision in the instant case. These two cases are: LeRoy F. Krusi, as Executor of the Will of Ida M. Krusi, Deceased, v. United States, No. 25786-R, and LeRoy F. Krusi, as Executor of the Will of Hermann Krusi, Deceased, v. United States, No. 25787-R.

ARGUMENT IN SUPPORT OF PETITION.

1. We believe that the Court is in error in stating, in the last paragraph of its opinion, that there appears to be "no distinction between the acquisition of the power to create a reversion in the settlor by a retained interest to be exercised by the settlor, after the deaths of all those holding the remainder interest, as in the *Fidelity* case, supra, and a reversion by operation of law arising from such deaths." The distinction is, in our opinion, that where the settlor has specifically provided in the trust instrument for retained powers or a retained interest it is apparent that the transfer was one "*intended* to take effect in possession or enjoyment at or after * * * death" (italics ours). In the absence of such a specific provision in the trust instru-

ment the settlor's intention must be determined by factual matters outside the trust instrument, such as the degree of remoteness, at the time of creation of the trust, of the failure of the entire line of beneficiaries. Where the settlor's intention is shown by the express provisions of the trust instrument, the degree of remoteness of the contingency under which the corpus might return to the settlor is immaterial, because the trust instrument itself reveals the settlor's intention.

That the settlor's intention should not be implied because of a remote possibility that the trust corpus might return to the settlor by operation of law has been well expressed by Judge Littleton* in his concurring opinion in *Central Hanover Bank & Trust Co. v. United States,* 58 Fed. Supp. 565 (Ct. Cls., 1945), as follows:

> "* * * the transfer when made was absolute and irrevocable, and any possibility of reversion to the grantor through the prior death of the named beneficiaries, including their issue, *was too remote to justify the taxing authorities implying an intention* on the part of the donor to reserve a reversionary interest of such a character as would justify the Government in including the value of the trust property in the gross estate for the purpose of the excise tax upon a transfer *'intended* to take effect in possession or enjoyment at or after death' within the meaning of the taxing act.

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*Judge Littleton was one of the original members of the Board of Tax Appeals, now The Tax Court of the United States, and its Chairman from April 1927 to November 1929, when he was appointed to the Court of Claims.

> I think the rule announced in Helvering v. Hallock, 309 U. S. 106, *where a reversionary interest was explicitly retained, should not be extended by implication and without proof that such was the intention of the donor.*" (Italics ours.)

The decisions of the Supreme Court in *Fidelity Co. v. Rothensies,* 324 U. S. 108, and *Commissioner v. Field,* 324 U. S. 113, cited in the Court's opinion in the instant case, are not in conflict with the view here expressed. In both cases the Court *first* determined that the decedent's express retention of a string over all the trust property justified its inclusion in the gross estate. In the *Fidelity* case the Court expressed its conclusion on this point as follows (p. 111):

> "Thus until the moment of her death or until an undetermined time thereafter the decedent held a string or contingent power of appointment over the total corpus of the trust. The *retention of such a string,* which might have resulted in altering completely the plan contemplated by the trust instrument for the transmission of decedent's property, *subjected the value of the entire corpus to estate tax liability.*" (Italics ours.)

In the *Field* case the trust expressly provided that upon termination the corpus was to be paid to the decedent. The Court justified the inclusion of the trust property in the gross estate in the following language (p. 115):

> "The trust here was limited in duration to the lives of the decedent's two nieces. *But if both nieces died before the decedent, the corpus would have been paid to the decedent rather than to the*

beneficiaries named in the trust instrument (in this instance the decedent's sister and the issue of his deceased brother). Thus until decedent's death it was uncertain whether any of the corpus would pass to the beneficiaries or whether it would revert to the decedent. *Decedent retaining a string attached to all the property until death severed it, the entire corpus was swept into the gross estate and was taxable accordingly.*" (Italics ours.)

Having determined in both cases that the decedent's *express* retention of a string brought the trust property within the gross estate, the Court next turned to a consideration of the *measure of the tax,* and it was in this connection that the Court expressed its opinion that the probability of the property returning to the decedent was immaterial. Thus in the *Fidelity* case the Court said (pp. 111-112):

"It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant *to the measurement of estate tax liability.* The application of this tax does not depend upon 'elusive and subtle casuistries'. Helvering v. Hallock, supra, 118. No more should the *measure of the tax* depend upon conjectures as to the propinquity or certainty of the decedent's reversionary interests. * * * The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency *is the measure of the tax.*" (Italics ours.)

And the statement in the *Field* case, at page 116, that

> "It makes no difference how vested may be the remainder interests in the corpus or how remote or uncertain may be the decedent's reversionary interest"

was made in considering the question of the *measure* of the tax.

In both the *Fidelity* case and the *Field* case, therefore, the Supreme Court first pointed out that the decedent had retained in the trust instrument a string over the corpus of the trust and that this justified the inclusion of the corpus in the gross estate as a transfer intended to take effect at death. The Court then held in both cases that the full value of the corpus of the trust should be included in the gross estate and that the degree of remoteness of the contingency under which the property might have returned to the decedent is immaterial for the purpose of measuring the tax. In both cases the lower courts had held that the transfer was intended to take effect at death. The only question involved was whether the entire value of the corpus of the trust should be included in the gross estate. These two cases are authority for the proposition that where the decedent has expressly retained in the trust instrument a string over the property, the entire value of the trust corpus must be included in the decedent's estate. They do not support the proposition that the mere possibility that the trust corpus might return to the decedent by

operation of law is sufficient to justify the imposition of the tax.

In two cases decided since the decision of the Supreme Court in the *Fidelity* case and the *Field* case the Circuit Court of Appeals for the Second Circuit has passed upon the exact question involved in the instant case and has held that the possibility that the trust corpus might return to the settlor by operation of law does not justify the imposition of the tax. These two cases are *Commissioner v. Irving Trust Co.,* 147 Fed. (2d) 946 (March 5, 1945), and *Commissioner v. Hall,* 153 Fed. (2d) 172 (January 16, 1946). In both cases the Government relied upon the *Fidelity* case and the *Field* case, but the Court said that these cases did not require a contrary holding.

Following the decision of the Supreme Court in *Helvering v. Hallock,* 309 U. S. 106 (1940), the Government took to the courts numerous cases involving the retention of a life interest on the part of the settlor of a trust (but in which a string over the corpus was not expressly reserved in the trust instrument), in an effort to obtain a decision that *May v. Heiner,* 281 U. S. 238, had been overruled.*

*Omitting District Court and Tax Court decisions, these cases are: *Commissioner v. Hall,* 153 Fed. (2d) 172 (Jan. 16, 1946) (CCA 2); *Central Hanover Bank & Trust Co. v. United States,* 58 Fed. Supp. 565 (Ct. Cls., 1945); *Commissioner v. Irving Trust Co.,* 147 Fed. (2d) 946 (CCA 2, 1945); *Helvering v. Proctor,* 140 Fed. (2d) 87 (CCA 2, 1944); *United States v. Brown,* 134 Fed. (2d) 372 (CCA 9, 1943); *New York Trust Co. v. United States,* 51 Fed. Supp. 733 (Ct. Cls., 1943); *Commissioner v. Kellogg,* 119 Fed. (2d) 54 (CCA 3, 1941).

In every one of these cases the decision went against the Government. But in every one of these cases there existed the possibility that the trust corpus might return to the settlor by operation of law. Yet such possibility was not considered sufficient to justify a holding that the transfer was one *intended* to take effect at death. No case has been found which holds that the mere possibility that the corpus might return to the settlor by operation of law is a transfer intended to take effect at death, with the exception of the first decision of the Court of Claims in *Central Hanover Bank & Trust Co. v. United States,* 57 Fed. Supp. 497 (1944), which was withdrawn and changed to a decision that the transfer was not intended to take effect at death (58 Fed. Supp. 565 (1945)).

If the possibility that the trust corpus might return to the settlor by operation of law is sufficient to subject the trust corpus to tax, no matter how remote the contingency, every trust created prior to the 1931 amendment to section 302(c) of the 1926 Act reserving the life income to the settlor with remainders to specified individuals will be subject to tax, and the question whether *May v. Heiner,* 281 U. S. 238, has survived *Helvering v. Hallock,* 309 U. S. 106, would become moot. But that this is not the case is clearly indicated by the concurring opinion of Mr. Justice Douglas in the *Field* case, 324 U. S. at pages 116-117, where he states:

> "If the trust gave a life estate to the decedent and the remainder to his children, Sec. 302(c) of the 1926 Act would not require the payment

of a tax under the rule of May v. Heiner, 281 U. S. 238; Burnet v. Northern Trust Co., 283 U.S. 782; McCormick v. Burnet, 283 U. S. 784, and Hassett v. Welch, 303 U. S. 303. * * * We need not determine whether the rule of May v. Heiner should survive Helvering v. Hallock, 309 U. S. 106. See Paul, Federal Estate & Gift Taxation (1942) Sec. 7.15. For in this case the grantor retained the right to reduce or cancel by will or written instrument the interests of the children; and the corpus would have been returned to the grantor if he survived his nieces."

And in *United States v. Brown,* 134 Fed. (2d) 372 (CCA 9, 1943), this Court said (page 373):

"Decision of the case necessarily turns on the inquiry whether May v. Heiner, supra, is presently the law. The current of decisions has doubtless encompassed May v. Heiner, but we are in no position to hold that the tide has overturned it. It would be fruitless to undertake a review of the cases touching one way or another on this subject. As late as 1938 the court, in Hassett v. Welch, supra, appears to have regarded May v. Heiner as subsisting authority. The court did not expressly or by necessary implication overrule it in Helvering v. Hallock, 309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. 604, 125 A.L.R. 1368. In the Hallock case the court fixed upon the provision for a reversion of the corpus as the 'string' warranting the inclusion, under Sec. 302(c) of the assets transferred in trust. *There is here no string; at least there is none appearing in the trust indenture itself, although it may be theoretically possible for a state of facts to arise which*

would defeat the trust. Accordingly, the judgment below must stand on the authority of May v. Heiner.'' (Italics ours.)

2. The Tax Court determined that "the reversion to which the estate might be subject * * * could arise only upon decedent's survival of two children and five grandchildren, all of whom were living upon the establishment of the trust. *These circumstances make it impossible to view this transfer as intended to take effect at or after decedent's death.''** This is the equivalent of a finding by the Tax Court that the settlor did not intend the transfer to take effect at or after her death. This suggests the application of *Dobson v. Commissioner,* 320 U. S. 489, in which the Supreme Court held that uniform and expeditious tax administration requires that the decisions of the Tax Court be given all credit to which they are entitled under the law, saying (page 501):

> "* * * all that we have said of the finality of administrative determination in other fields is applicable to determinations of the Tax Court. Its decision, of course, must have 'warrant in the record' and a reasonable basis in the law. But 'the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' " (Citing cases.)

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*Incidentally, the Tax Court did not hold that there was no possibility that the corpus would return to the settlor during her lifetime, as stated in the opening sentence of this Court's opinion.

and again (page 502):

> "* * * when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand."

Perhaps this Court intended to suggest, on page 2 of its opinion, that the Tax Court had made a clear-cut mistake of law in failing to consider Sec. 81.17 of Treasury Regulations 105. But, as shown in the preceding paragraph of the opinion, the Tax Court cited in support of its opinion the leading Tax Court case on this subject, *Francis Biddle Trust,* 3 T. C. 832, in which the regulation (Art. 17 of Reg. 80, which is the same in all material respects as Sec. 81.17 of Reg. 105) is set forth in full. It cannot be said, therefore, that the Tax Court has failed to consider the regulation.

Wherefore, it is respectfully urged that respondent's petition for a rehearing may be granted.

Dated, San Francisco, California,
May 10, 1946.

Respectfully submitted,
LEON de FREMERY,
MORRISON, HOHFELD, FOERSTER,
SHUMAN & CLARK.
Amici Curiae.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing brief in support of respondent's petition for rehearing is well founded and that said petition is not interposed for delay.

Dated, San Francisco, California,
May 10, 1946.

LEON de FREMERY,
Of Counsel for Amici Curiae.